80-2086

No._____

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In the Supreme Court of the United States

OCTOBER TERM, 1980

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,

Petitioners,

versus

KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA,

Respondents,

and

U.S. DEPARTMENT OF EDUCATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Does the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, authorize the award of attorney's fees to a prevailing party in an action against the federal government?

(2) What are "special circumstances" sufficient to render unjust the award of attorney's fees to a prevailing party under the Civil Rights Attorney's Fees Awards Act of 1976?

(3) May the Civil Rights Attorney's Fees Awards Act of 1976 be applied retroactively to a factual situation wherein the trial court has specifically found that assessing attorney's fees against a defendant would be a "miscarriage of justice"?

LISTING OF PARTIES

Petitioners:

(1) East Baton Rouge Parish School Board

(2) Donald D. Hunt

(3) Mrs. Wallace Armstrong

(4) H. E. Aull

(5) A. Bridger Eglin

(6) L. L. Hines

(7) Ben H. Peabody

(8) George H. Richard

(9) W. W. Wells

(10) J. O. Claudell

(11) Martial J. Lafleur, Jr.

(12) Randall Goodwin

(13) T. H. Montgomery

(14) Robert Aertker

(15) Thomas Holliman

Respondents:

(1) Knights of the Ku Klux Klan, Realm of Louisiana

(2) U.S. Department of Education, in place of U.S. Department of Health, Education & Welfare

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Respondents,

and

U.S. DEPARTMENT OF EDUCATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners, the East Baton Rouge Parish School Board, et al., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 23, 1981.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit,

not yet reported, appears herein as Appendix "A." The opinion of the United States District Court for the Middle District of Louisiana was rendered on January 29, 1979, and judgment was signed accordingly on March 21, 1979. A copy of the opinion of the District Court appears herein as Appendix "B."

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 23, 1981. This petition for certiorari and for a stay of proceedings was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1988.

> "§ 1988. Proceedings in vindication of civil rights.
> The jurisdiction in civil and criminal matters conferred on the District Courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the States wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts and the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction

of punishment on the party found guilty. *In any action or proceeding to enforce a provision of section 1977, 1978, 1979, 1980 and 1981 of the Revised Statutes [42 U.S.C.S. §§ 1981-83, 1985, 1986], Title IX of Public Law 92-318 [20 U.S.C.S. §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 U.S.C.S. §§ 1 et seq.], or Title VI of the Civil Rights Act of 1964 [42 U.S.C.S. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs."*

STATEMENT OF THE CASE

This case was the subject of a decision by the Fifth Circuit at an earlier stage and the basic facts out of which the current question arises were stated by the Court in that earlier decision as follows (R. Vol. I, p. 153)[1]:

" 'As of November 1975, defendant East Baton Rouge Parish School Board (Board) maintained a standing policy of allowing outside organizations to use school facilities for meetings and gatherings during non-school hours. Permission was granted on a first-come, first-serve basis, on condition of a modest rental and the payment of any overtime custodial or janitorial expenses occasioned. In granting permission for such use, no distinction between applicants was made on the basis of their political or ideological views, and organizations holding a variety of such views had in the past availed themselves of school facilities.

Early that month plaintiff-appellant, Knights of the Ku Klux Klan, Realm of Louisiana (KKK), a Louisiana

[1] "R." references are to the four-volume record on appeal that has not yet been filed with the Court in this case.

nonprofit corporation chartered August 8, 1975, applied in due form for use of a high school gymnasium to hold what it termed a patriotic meeting on the night of Saturday, November 22. By letter of November 17, the Board granted permission for the meeting. This letter was received by KKK on the following day, or shortly thereafter, and matters proceeded.

• • •

But the planned meeting was not to be, for wind of it had come to the Branch Office for Civil Rights of the United States Department of Health, Education and Welfare in Dallas, Texas. On November 19, Dr. John A. Bell, Branch Chief in Dallas, telephoned the Board, confirming by telegram, that permitting use of school facilities for such a meeting would violate certain regulations promulgated pursuant to the Emergency School Aid Act, 20 U.S.C. § 1601 *et seq.* (ESAA). These regulations, partly quoted in the wire, denied federal funds to any educational agency permitting use of its facilities by a group 'which discriminates against minority group children aged 5 to 17 inclusive, in its admissions or membership policies, or otherwise practices . . . discrimination against such children on the basis of race, color, or national origin . . .' Dr. Bell's telegram continued with threats that if the KKK meeting were permitted he would 'constitute [sic] enforcement proceedings seeking the termination of all ESAA funding to your district' and that the use would also violate Title VI and thus 'trigger an enforcement action . . . to end all federal financial assistance to your district.' The next day, November 20, faced with the loss of annual payments in the millions, the Board withdrew its permission for KKK to use the gymnasium.

The following day Dr. Bell, having observed the effect by his barrage, attempted a partial unfiring of the guns. In a wire to the Board, he suggested that the first amendent, as well as ESAA and Title VI, might be

seen as cutting some figure in the Board's decision and that the Board should consider it too in determining what course to follow. He stated also that if the first amendment required that KKK's use be permitted, such a use could not be grounds for enforcement action under any federal program. Thus, the Board was left to redetermine correctly, in a maximum of two days and arguably at its peril either way, the difficult issues with which we grapple today. Not surprisingly, it sat steady in the boat and took no action to reverse the cancellation.

Indeed, at the same meeting at which it had cancelled the KKK meeting the Board had also declared a moratorium on further use of school facilities by outside private organizations pending the fashioning of a new policy designed to avoid both the first amendent Scylla and the HEW Charybdis. And several months later, on February 19, 1976, the Board adopted its present policy. That policy, • • • frankly discriminates among applicants on the basis of the content of the ideas they advocate and, arguably, on their membership and meeting-attendance policies. Among those excluded from use of the facilities are groups advocating racial discrimination, as KKK admittedly does. Plaintiff immediately amended its complaint to attack the new policy on first amendment grounds, as stigmatizing particular political preferences or beliefs and as 'chilling' rights of freedom of speech, assembly and association.

At a hearing on April 20, 1976, the district court denied the preliminary and permanent injunctions requested by plaintiff against application to it of the new policy; ruled that the policy did not violate equal protection or improperly deny rights of speech, assembly or association; and dismissed the suit in its entirety.'

The Fifth Circuit, in its August 25, 1978 opinion, reversed the district court's dismissal of the suit, directed the issuance of

preliminary injunctive relief against enforcement of the Board's new policy and remanded the case to the district court for a fuller factual development so that the Klan's First Amendment claim could be properly adjudicated.

After issuing temporary and preliminary injunctive relief in conformance with that decision, the district court on January 22, 1979 held a hearing on the merits. R. Vol. IV. On January 19, 1979, the Court entered a Judgment and Injunction Order, (R. Vol. I., p. 210) which set general guidelines to which the Board must adhere in making its facilities available to the public. The court also permanently enjoined HEW and its employees and officials 'from interfering or attempting to interfere with [the Klan's] use of school facilities * * * if permission is granted [by the Board] to use them in accordance with this injunction * * * .' HEW was further enjoined from threatening to terminate funds on the basis of the Board's grant of permission to the Klan to use its facilities. The Court went on to qualify the injunction against HEW by stating that

> 'this injunction shall not prevent * * * the defendant Department of Health, Education and Welfare from taking any necessary action in the future consistent with its statutory duties under Title VI of the Civil Rights Act of 1974 * * *, or the Emergency School Aid Act * * *.'

R. Vol. I, p. 213. Finally, the court ordered 'that the costs of these proceedings be, and they are hereby assessed against the defendant, Department of Health, Education and Welfare, to the exclusion of all other parties.' *Ibid.*

On March 21, 1979, the court entered a second order dealing specifically with the question of costs. R. Vol. I, p. 242. The court explained that costs were being assessed against HEW because 'the only thing that necessitated the East Baton

Rouge Parish School Board being a defendant in this suit was the fact that [HEW] improperly, illegally, and without any regard for the rights of the [Board], threatened the school board with deprivation of funds to which it was entitled if it permitted the [Klan] to hold a meeting on school property.' R. Vol. I, p. 242. The court went on to explain that under all the circumstances 'it would be a miscarriage of justice to cast the defendant, East Baton Rouge Parish School Board, for any of the costs or attorney fees incurred in this suit.' R. Vol. I, p. 243. Accordingly, the court assessed all of the attorney fees ($11,681.25) and the costs ($239.16), for a total of $11,920.41, against HEW, and expressly released the Board from any obligation to pay the costs. *Ibid.*"

HEW appealed that part of the decision of the trial court which assessed attorney's fees against it. The Knights of the Ku Klux Klan cross-appealed, alleging that the trial court erred in not holding the East Baton Rouge Parish School Board and Dr. John A. Bell solidarily liable with HEW for all court costs and attorney's fees incurred by the KKK in prosecuting this action.

The Fifth Circuit concluded that the Civil Rights Attorney's Fees Awards Act of 1976 did not waive federal sovereign immunity and, therefore, it reversed the decision of the trial court awarding attorney's fees against HEW. The Fifth Circuit also reversed the decision of the trial court that attorney's fees should not be awarded against the East Baton Rouge Parish School Board, and remanded the case to the District Court "to determine what amount, if any, of attorney's fees reasonably may be assessed against the Board."

From this ruling, the East Baton Rouge Parish School Board, et al., petitioners herein, now pray that a writ of cer-

tiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

REASONS FOR GRANTING THE WRIT

I.

The Fifth Circuit concluded in its decision below that the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, does not constitute an express waiver of federal sovereign immunity for attorney's fees. The Court noted at page 4012 of its corrected decision that

> ". . . Examination of both the Senate and House reports on the Awards Act does not support the conclusion that the Act, as enacted, was intended to waive federal sovereign immunity.
>
> • • •
>
> We hold, therefore, that the Awards Act does not provide for a waiver of federal sovereign immunity for attorney's fees in cases brought against the federal government under the civil rights statute in question." Corrected Opinion of February 23, 1981, at page 4013.

The Fifth Circuit based this decision, at least in part, on the fact that the only two circuits that had addressed this issue had held accordingly. *Cf. NAACP v. Civiletti*, 609 F. 2d 514 (D.C. Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 3012, 65 L. Ed. 2d 1114 (1980); *Shannon v. HUD*, 577 F. 2d 854 (3rd Cir. 1978), cert. denied, 439 U.S. 1002, 99 S. Ct. 611, 58 L. Ed. 2d 677 (1978). Including the Fifth Circuit with these two other circuits would appear to indicate that at least three different circuit courts of appeals have agreed with this conclusion.

It is very interesting to note, however, that the two most recent of these three cases, *NAACP v. Civiletti*, *supra.*, and this case, have both been decided by divided courts over strong dissents by members of those courts. In the case at hand, Circuit Judge Goldberg stated at page 4016 of the Corrected Opinion as follows:

> "However, I dissent from parts I-III of the majority decision, finding the United States Department of Health, Education and Welfare (HEW) immune from paying attorney's fees. My reasons for finding HEW liable for the payment of attorney's fees have been fully detailed in Judge Wright's dissenting opinion in *NAACP v. Civiletti*, 609 F. 2d 514, 521 (D.C. Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 3012, 65 L. Ed. 2d 1114 (1980). It would be an unnecessary act to add a jot or tittle thereto."

Petitioner herein agrees with Circuit Judge Goldberg that it is unnecessary to add anything to the outstanding dissenting opinion written by Chief Judge J. Skelly Wright in *NAACP v. Civiletti*, *supra.* This opinion addresses itself to the language of 42 U.S.C. § 1988, the purposes behind its enactment, and its legislative history. Chief Judge Wright concluded as follows:

> "An examination of the purposes, language and legislative history of § 1988 provides ample support for the conclusion that Congress intended to authorize attorney's fees awards against the United States under the Act." 609 F. 2d at 531.

Rather than retrace each of the statements made by Chief Judge Wright in his dissent, petitioner has annexed to this petition for certiorari as Appendix "C" the entire dissenting opinion. Petitioner incorporates each of the arguments made by Chief Judge Wright into this petition as its own, and it urges this Honorable Court to carefully review the arguments

made in said dissenting opinion before deciding whether the writ of certiorari should be granted as to this issue. Petitioner respectfully submits that Chief Judge Wright was correct in his conclusion, and that this Court should grant the writ of certiorari in order to more fully review this issue.

II.

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides in pertinent part as follows:

> ". . . The Court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." [Emphasis supplied.]

This statute makes it abundantly clear that an award of attorney's fees is not mandatory, but rather is a matter addressed to the sound discretion of the Court. As the Fifth Circuit wrote in *Morrow v. Dillard*, 580 F. 2d 1284 (5th Cir. 1978),

> "The language of the Act itself unequivocally and expressly makes the award of fees a question of discretion for the Court. Its judgment should be reversed only for an abuse of discretion. *Sandford v. R. L. Coleman Realty Company*, 573 F. 2d 173, 179 (4th Cir. 1978)." 580 F. 2d at 1300. *Cf.* also *Zarcone v. Perry*, 538 F. Supp. 788 (D. C. 1977); *Keyes v. School District Number One, Denver, CO*, 439 F. Supp. 393 (D. C. Colo. 1977); *Bond v. Stanton*, 555 F. 2d 172 (7th Cir. 1977).

This Court limited the discretion of trial courts in this matter in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S. Ct. 964, 19 L. Ed. 2d 1263 (1968), a case arising under Title II of the Civil Rights Act of 1964. Other jurisprudence has made it clear that the same standard applies in

cases brought under the 1976 Act. *Wharton v. Knefel*, 562 F. 2d 550, 557 (8th Cir. 1977); *Brown v. Culpepper*, 559 F. 2d 274, 277 (5th Cir. 1977).

> This standard has always been stated as follows:
> ". . . The party seeking to enforce the rights protected by the statutes covered by S. 2278 [or under U.S.C. § 1988] if successful, should ordinarily recover an attorney's fee *unless special circumstances would render such award unjust.*" [Emphasis supplied.] *Newman v. Piggie Park Enterprises, Inc., supra.*; *Brown v. Culpepper, supra.*

This Court in *Newman* failed, however, to give any indication as to what would constitute "special circumstances" sufficient to "render such an award [of attorney's fees] unjust." Indeed, this author has been able to find no decision of this Court in which it defined the term "special circumstances" as used in *Newman*.

The Fifth Circuit concluded below that the "special circumstances" exception to the general rule of awarding attorney's fees to a prevailing party is an extremely limited one, and is applied only in the following situations:

> "(1) Situations in which, although clothed as a claim under § 1983, plaintiff's law suits sought to recover for what essentially was a private state law tort claim for money damages, and
>
> (2) Those in which, although plaintiffs received the benefits sought to be obtained by the law suit, their efforts did not contribute to achieving those results." Corrected Opinion of February 23, 1981, at page 4015.

The Fifth Circuit went on to conclude that, since the situation presented in the case at hand did not involve either of these reasons for recognizing special circumstances sufficient

to deny an award of attorney's fees, those fees should be awarded against the East Baton Rouge Parish School Board. Corrected Opinion of February 23, 1981, at page 4015. Said School Board, petitioner herein, would respectfully submit that the Court of Appeals erred in limiting "special circumstances" to these two particular sets of situations.

Petitioner herein would urge this Honorable Court to grant the application for writ of certiorari on this issue, so that it might have the opportunity to clarify the "special circumstances" language found in *Newman v. Piggie Park Enterprises, Inc., supra.*, which is quoted above. After such clarification, petitioner School Board is confident that the unusual factual circumstances presented by this case will fall within the test outlined by this Court for determining "special circumstances."

The District Court explained its reasons for exempting the School Board from liability for attorney's fees as follows:

> "The only thing that necessitated the East Baton Rouge Parish School Board being a defendant in this suit was the fact [HEW] . . . improperly, illegally, and without regard for the rights of the [School Board] . . . threatened the School Board with deprivation of funds to which it was entitled if it permitted [plaintiff] to hold a meeting on school property.
>
> This threat was far in excess of any authority, under the circumstances, that [HEW] had. However, in view of the magnitude of the threat, the School Board was compelled, as a practical necessity, to comply with the wishes of [HEW].
>
> • • •
>
> Under all of these circumstances, it was, and is, the opinion of this Court that it would be a miscarriage of justice

to cast the [School Board] for any of the costs or attorney's fees incurred in this suit."

The Fifth Circuit cited this language at page 4013-4014 of its Corrected Opinion. The Fifth Circuit went on, however, to conclude that the policy which was adopted by the Board on February 19, 1976 and which policy was found to be unconstitutional by the Fifth Circuit on appeal would not fall in the category of "special circumstances." Opinion of February 23, 1981, at page 4414. This conclusion, of course, overlooked the obvious fact that there would have been no need for the adoption of this policy had not HEW intervened in this matter, since the petitioner School Board had already granted permission to the Knights of the Ku Klux Klan to use its school facility for the meeting of that organization.

This conclusion also overlooked the fact that the KKK never applied to use a facility of the East Baton Rouge Parish School System following the adoption of this policy. A law or policy itself does not violate the civil rights of an individual. Only the application of that law or policy can constitute such a violation. The decision of the Fifth Circuit on the constitutionality of this policy would appear, therefore, to have been little more than an advisory opinion.

In conclusion as to this issue, petitioner School Board would submit that this Honorable Court would not have placed the "special circumstances" language in its decision in *Newman v. Piggie Park Enterprises, Inc., supra.*, if it had not intended that language to have some significance. It is respectfully submitted that the interpretation which the Fifth Circuit gave to that language in this particular case was improper and that this Court should now grant the application for writs of certiorari in order to formulate a clear standard under which courts may determine when prevailing parties are not entitled

to attorney's fees pursuant to 42 U.S.C. § 1988. In its discretion, the trial court concluded that the unusual factual circumstances presented herein constituted "special circumstances," and the Fifth Circuit should not have reversed this conclusion without clearly finding that the trial court had abused its discretion.

III.

In its decision, the Fifth Circuit used the following language:

> "In *Rainey v. Jackson State College*, 551 F. 2d 672 (5th Cir. 1977), however, this Court held that the Legislative history of the Awards Act authorizes retroactive fee awards unless such an award would be "manifestly unjust." See also *Hutto v. Finney*, 437 U.S. 678, 98 S. Ct. 2565, 57 L.Ed. 2d 522 (1978); *Universal Amusement Company, Inc. v. Vance*, 559 F. 2d 1286 (5th Cir. 1977), cert. denied, 442 U.S. 929, 99 S. Ct. 2859, 61 L. Ed. 2d 296. The Board has not attempted to demonstrate how retroactive application of the Awards Act would be more burdensome or unfair in this case than it would in any other. Consequently, we hold that the District Court erred in failing to award attorney's fees against the School Board." Corrected Opinion of February 23, 1981, at page 4015.

The Civil Rights Attorney's Fees Awards Act of 1976, which revised 42 U.S.C. § 1988 to permit legal expenses to be awarded to prevailing parties in suits brought under 42 U.S.C. §§ 1981-1986, was enacted on October 19, 1976. The original complaint in this action was filed on November 21, 1975. The complaint was amended on February 26, 1976 to include allegations that the new policy adopted by the School Board was unconstitutional. The Fifth Circuit concluded, as quoted above, that the Board had not attempted to demonstrate how retro-

active application of the Awards Act would be unfair in this case.

It is the petitioner School Board's position, however, that the unfairness of this retroactive application was demonstrated to the trial court, after which the trial court made this determination:

> ". . . Under all of these circumstances, it was, and is, the opinion of this Court that it would be a miscarriage of justice to cast the defendant, East Baton Rouge Parish School Board, for any of the costs and attorney's fees incurred in this suit." R. Vol. I. page 243.

Unfortunately, as is the problem with "special circumstances" as discussed hereinabove, the courts have not defined what would be considered "manifestly unjust" or what factors should be considered before deciding if the award of attorney's fees would be "manifestly unjust." It would appear absolutely clear that this issue is one which must be determined by the trial court, in its discretion, after reviewing all the facts. In light of the statement previously quoted from the trial court, petitioner herein submits that said trial court found the award of such fees against the School Board to be "manifestly unjust."

If, therefore, "manifestly unjust" may be equated with "miscarriage of justice," one of the two exceptions to the retroactive applicability of 42 U.S.C. § 1988 has been met. *Cf. Bond v. Stanton*, 555 F. 2d 172, 173 (7th Cir. 1977); *Bradley v. School Board of City of Richmond*, 416 U.S. 696, 711, 94 S. Ct. 2006, 40 L. Ed. 2d 476 (1976); *Thorpe v. Housing Authority of City of Durham*, 393 U.S. 268, 281, 89 S. Ct. 518, 21 L. Ed. 2d 474 (1969).

In conclusion as to this issue, petitioner School Board

would respectfully submit that this Honorable Court should grant the application for writs of certiorari, so that it might define the term "manifestly unjust" as used in the cited cases. After promulgating this definition, petitioner School Board respectfully submits that this Court will determine that the Fifth Circuit erred and that it would be "manifestly unjust" to cast the petitioner East Baton Rouge Parish School Board for such attorney's fees.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals in this matter.

Respectfully submitted,
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JOHN F. WARD, JR.

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KNIGHTS OF THE KU KLUX KLAN
REALM OF LOUISIANA

VERSUS

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL.

CIVIL ACTION NUMBER 75-443

JUDGMENT AND INJUNCTION ORDER

On the 20th of April, 1976, this Court denied a preliminary and permanent injunction requested by plaintiff, Knights of the Ku Klux Klan, and dismissed the action. Thereafter, plaintiff appealed this Court's Order of Dismissal to the United States Court of Appeals for the Fifth Circuit. On August 25, 1978, the Court of Appeals reversed the Order of Dismissal and remanded the case to the District Court for a hearing on the merits. Further, the Court of Appeals directed the District Court to issue forthwith a preliminary injunction consistent with its Opinion of August 25, 1978, restraining the East Baton Rouge Parish School Board from preventing plaintiff's rental of a public school facility under the terms of the Board's policy restricting such use by organizations advocating racial discrimination.

Thereafter, on October 29, 1978, this Court entered a temporary and preliminary injunction restraining defendants from interfering with plaintiff's "using public school facilities for the conduct of public meetings on the same terms and conditions which they, the defendant School Board, apply to all others seeking similar use of such facilities."

On the 22nd of January, 1979, a trial on the merits was brought before this Court. All parties having appeared through

counsel, and the Court having heard the pleadings, the evidence and arguments of counsel, and upon due consideration thereof and upon the entire record in this case, it appearing to the Court that plaintiff should be granted relief:

IT IS ORDERED that defendant School Board, its agents, servants, employees and all persons in active concert and participation with it are hereby permanently enjoined from enforcing its current policy enacted on February 19, 1976, insofar as that policy uses the ideals or beliefs advocated by the person or group seeking use of public school facilities as a criterion for the granting or denying of permission to use such facilities and they are hereby permanently enjoined from refusing to permit plaintiff herein from using the East Baton Rouge Parish School District public school facilities for the conduct of public meetings on the same terms and conditions which they, the School Board, shall apply to all others seeking similar use of such facilities. In the event the School Board continues a policy of permitting school facilities to be used for other than educational purposes, included among the terms and conditions upon which the School Board shall rely in granting or denying permission to the person or group seeking use of a public school facility are the following requirements:

(1) that meetings held at a public school facility in the East Baton Rouge Parish School District shall be scheduled for non-school hours, and on dates and times that do not interfere directly or indirectly with the educational programs or activities conducted by the East Baton Rouge Parish School Board;

(2) that any person or organization using a public school facility for a public meeting shall agree to plan and hold such meeting in an orderly and peaceable manner;

(3) that any person or organization using such facilities for a public meeting shall agree that no person will be denied admission to, excluded or expelled from such meeting on the grounds of race, color or national origin; and,

(4) that the East Baton Rouge Parish School Board shall reserve the right to cancel or refuse the use of its facilities if it determines that the conditions set forth in subparagraphs 1 through 3 above have been violated by any person or group which has used a public school facility.

IT IS FURTHER ORDERED that defendants, John A. Bell, Chief, Elementary and Secondary Branch, Office of Civil Rights, Region VI, Department of Health, Education and Welfare (H.E.W.); Joseph A. Califano, Secretary of the United States Department of H.E.W.; and the United States Department of H.E.W., their successors in office, their officers, attorneys, servants, agents, associates, members, employees and all persons acting in conjunction or in concert with them or at their direction, be, and they are, hereby permanently enjoined from interfering or attempting to interfere with plaintiff's use of school facilities operated by the East Baton Rouge Parish School Board if permission is granted to use them in accordance with this injunction; and they are further permanently enjoined from such interference, or attempted interference by any method whatsoever, including specifically any attempt, or threatened attempt, to withhold, recall, cut off, any federal funds whatsoever which may otherwise be available to the East Baton Rouge Parish School System because of their permitting the plaintiff, the Knights of the Ku Klux Klan, to use school facilities on the same basis as other organizations and in compliance with the terms of this injunction, or to otherwise proceed in any manner against the East Baton Rouge Parish School Board, its agents, servants, or employees, because of such permitted use and compliance with this injunction. However, this injunction shall not prevent the defendant School Board or the defendant Department of Health, Education and Welfare from taking any necessary action in the future consistent with its statutory duties under Title VI of the Civil Rights Act of 1974 [42 U.S.C. § 2000(d)(1-5)], or the Emergency School Aid Act [20 U.S.C. § 1601, et seq.], in the event that an organization or person violates any of the above conditions.

IT IS FURTHER ORDERED that costs of these proceedings be, and they are hereby assessed against the defendant, Department of Health, Education and Welfare, to the exclusion of all other parties.

Done and signed at Baton Rouge, Louisiana, this 29th day of January, 1979.

/s/ E. Gordon West

UNITED STATES
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

KNIGHTS OF THE KU KLUX KLAN
REALM OF LOUISIANA

VERSUS

EAST BATON ROUGE PARISH
SCHOOL BOARD, ET AL.

CIVIL ACTION

NUMBER 75-443

JUDGMENT

For written reasons this day assigned and filed in the record of this case:

IT IS ORDERED that there be judgment herein in favor of the plaintiff, and against the defendant, the United States Department of Health, Education and Welfare, in the full sum of Eleven Thousand Nine Hundred Twenty and 41/100 ($11,920.41) Dollars, representing attorney fees and costs to be paid the plaintiff in this case.

IT IS FURTHER ORDERED that there be judgment herein in favor of the defendant, East Baton Rouge Parish School Board, and against the plaintiff, Knights of the Ku Klux Klan, Realm of Louisiana, releasing and relieving the said defendant, East Baton Rouge Parish School Board, from any and all responsibility in connection with the above mentioned costs.

Baton Rouge, Louisiana, March 21, 1979.

/s/ E. Gordon West

UNITED STATES
DISTRICT JUDGE

APPENDIX B

KNIGHTS of the KU KLUX KLAN, REALM OF LOUISIANA,
Plaintiff-Appellee-Cross-Appellant

v.

EAST BATON ROUGE PARISH SCHOOL BOARD et al.,
Defendants-Cross-Appellees,

U.S. Department of Health, Education and Welfare,
Defendant-Appellant-Cross-Appellee.

No. 79-1780.

United States Court of Appeals,
Fifth Circuit.
Unit A

Feb. 23, 1981.

Appeals from the United States District Court for the Middle District of Louisiana.

Before GOLDBERG, POLITZ and SAM D. JOHNSON, Circuit Judges.

PER CURIAM:

As of November 1975, the East Baton Rouge Parish School Board (the Board) maintained a policy of allowing organizations to rent its facilities for meetings on a first come, first served basis. In early November of 1975 the Knights of the Ku Klux Klan, Realm of Louisiana (plaintiff) requested and was granted permission to use a high school gymnasium for a "patriotic" meeting. On November 19, however, Dr. John Bell, chief of the Dallas branch office for civil rights for the United States Department of Health, Education, and Wel-

fare (HEW) informed the Board that if plaintiff's proposed meeting were permitted the Department would institute enforcement proceedings seeking the termination of all Emergency School Aid Act funds to the school district. ESAA regulations deny federal funding to any agency permitting the use of its facilities by any group that discriminates against minority children. *See* 20 U.S.C. § 1601 *et seq.*; 45 C.F.R. § 185.43(d)(3). Dr. Bell also informed the Board that plaintiff's use of the facilities would also violate Title VI and thus "trigger an enforcement action . . . to end all federal financial assistance to your district." Faced with the possible loss of its federal funding, the Board withdrew permission for the meeting the next day, November 20.

The following day, however, Dr. Bell acknowledged in a telegram to the Board that if the first amendment required that plaintiff's use of the school facilities be permitted, such a use could not be grounds for an enforcement action under any federal program. Unsure of what to do, the Board took no action to reverse the cancellation. Plaintiff filed suit on November 21, 1975, pursuant to, inter alia, 42 U.S.C. § 1983 and the first and fourteenth amendments of the United States Constitution. The district court denied plaintiff's motion for a temporary restraining order on November 22, 1975. On December 10, 1975, plaintiff amended its complaint to include the federal defendants and asserted claims under, *interalia*, 42 U.S.C. §§ 1985 and 1986. The Board maintained a moratorium on outside use of school facilities until February 19, 1976, when the Board adopted a policy that prohibited use of school facilities to any group advocating racial discrimination. Plaintiff subsequently amended its complaint to include an attack on the new policy.

Following a hearing on April 20, 1976, the district court denied plaintiff's motion for preliminary and permanent injunctive relief, and dismissed the suit. The district court's order was reversed by this Court in *Knights of the Ku Klux Klan, Realm of Louisiana v. East Baton Rouge Parish School Board*, 578 F. 2d 1122 (5th Cir. 1978).

Following remand by this Court, the district court entered a judgment and injunction order that set general nondiscriminatory guidelines to which the Board must adhere in making its facilities available to the public. The court also permanently enjoined HEW "from interfering or attempting to interfere with [plaintiff's] use of school facilities." The order also stated that the costs of the proceeding were to be taxed against HEW.

[1] In response to plaintiff's motion for attorney's fees, the district court issued a second order in which it assessed costs and attorneys' fees for the injunction proceeding in the amount of $11,920.41 against HEW. In so doing, the court expressly released the School Board from any liability for attorneys' fees HEW appeals from the award of attorneys' fees against it. Plaintiff cross-appeals from the district court's refusal to impose attorneys' fees against the School Board as well as against HEW.[1]

I.

[2, 3] 28 U.S.C. § 2412 provides in part:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action.

This section has been consistently interpreted as preserving the sovereign immunity of the United States against awards of attorneys' fees absent a clear or express statutory waiver. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 267-68, 95 S.Ct. 1612, 1626-27, 44 L.Ed.2d 141 (1975). A

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[1] Plaintiff argues for the first time on appeal that attorneys' fees should also have been awarded against Dr. Bell in his individual capacity. Plaintiff did not plead for this relief in the district court and the record is devoid of any basis for such an award under the "bad faith" exception relied upon by plaintiff. *See Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59, 95 S.Ct. 1612, 1622-23, 44 L.Ed.2d 141 (1975).

waiver may arise in two ways. First, a statute may explicitly impose liability for attorneys' fees upon the United States.[2] Secondly, a waiver of immunity may arise by "necessary implication" from the context of the statute. *See Natural Resources Defense Counsel, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973).

[4] Wholly apart from the question of sovereign immunity, another obstacle prevents federal court litigants from recovering attorneys' fees in most cases. Unlike the British courts, American courts traditionally have denied attorneys' fees to prevailing parties. *See Blue v. Bureau of Prisons*, 570 F.2d 529, 531-32 (5th Cir. 1978). Although courts have recognized exceptions to this "American Rule,"[3] the policy requiring each party to bear its own cost of counsel has remained largely intact.

In an effort to expand the class of prevailing parties entitled to recover attorneys' fees, federal courts developed the "private attorney general" theory, under which private litigants are compensated when they vindicate an important public policy. *See Fairley v. Patterson*, 493 F.2d 598, 606 (5th Cir. 1974). In *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), however, the Supreme Court rejected this theory, and held that because Congress traditionally has enacted attorneys' fees provisions, and because federal courts are ill-equipped to "pick and choose" the public policy interests deserving of such added protection, federal courts should not "make major inroads on a policy matter that Congress has reserved for itself." 421 U.S. at 269, 95 S.Ct. at 1627. *See* 570 F.2d at 532.

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[2] For example, Titles II and VII of the Civil Rights Act of 1964 provides that the court may award attorneys' fees to a prevailing party as part of the costs, and that "the United States shall be liable for costs the same as a private person." 42 U.S.C. §§ 2000a-3(b), 2000e-5(k).

[3] Bad faith on the part of the losing party is one exception; the so-called "common fund" doctrine is another, *see Hall v. Cole*, 412 U.S. 1, 93 S.Ct. 1943, 36 L.Ed.2d 702 (1973).

II.

[5] In the present case, the district court referred to no statutory or other authority to support its award of attorneys' fees against HEW. Plaintiff argues that the Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988, is such authority. The Awards Act, which was enacted largely in response to the Supreme Court's decision in *Alyeska*[4] provides in relevant part:

> In any action or proceeding to enforce a provision of section [1983, 1985, 1986] the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Plaintiff asserts that his language is sufficient to waive sovereign immunity for attorneys' fees. In *Hutto v. Finney*, 437 U.S. 678, 694, 98 S.Ct. 2565, 2575, 57 L.Ed.2d 522 (1978), the Supreme Court held that the Awards Act evinced a congressional intent to subject the states to liability for attorneys' fees:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws.

Plaintiff's interpretation is supported neither by *Hutto* nor by the language of the Act. In upholding an award of attorneys' fees against a state in *Hutto*, the Supreme Court placed controlling significance on the fact that, in enacting the Awards Act, Congress imposed attorneys' fees "as a part of costs." Whereas the states traditionally have been liable for costs without regard to claims of sovereign immunity, 98 S.Ct. at 2576, the federal government is liable for costs only to the extent authorized by statute, and section 2412 specifically excludes attorneys' fees from the costs for which immunity is waived. 28 U.S.C. § 2412. Consequently, that the Awards Act allows the recovery of attorneys' fees against the federal government, compel a similar conclusion.

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[4] *See* R.Rep.No. 94-1558, 94th Cong. 2d Sess. at 2 (1976); S.Rep.No.94-1011, 94th Cong. 2d Sess. at 1 (1976), U.S.Code Cong. & Admin. News 1976, p. 5908.

Comparison of the language of the Awards Act with other statutes allowing recovery of attorneys' fees further demonstrates the absence of legislative intent to waive federal sovereign immunity with respect to attorneys' fees. Although the Act's reference to "any action" certainly is broad, when waiving federal sovereign immunity for attorneys' fees in other statutes, Congress has spoken with unmistakable clarity. For example, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(k), provides in part that a reasonable attorneys' fee may be awarded as a part of the costs, and that "the United States shall be liable for costs the same as a private person." *See also*, 5 U.S.C. §§ 552(a)(4)(E); 42 U.S.C. §§ 2000a-3(b), 2000 b-1. The Awards Act simply does not possess the same degree of specificity that Congress has deemed necessary when waiving federal sovereign immunity for attorneys' fees in other statutes, and therefore falls short of the "clear or express" language necessary to satisfy section 2412.

III.

Plaintiff argues that if the "any action" language of the Awards Act does not constitute an express waiver of federal sovereign immunity for attorneys' fees, such a waiver nonetheless arises by "necessary implication" from the Act when read as a whole. In support of this argument, plaintiff stresses that the Awards Act is remedial in nature and should be liberally interpreted. Plaintiff also argues that because Congress enacted the Awards Act in direct response to *Alyeska*, the legislative intent was to remove *all* obstacles to recovery of attorneys' fees on civil rights cases, including that of federal sovereign immunity.

Although, as noted *supra*, there is strong support for the assertion that the Awards Act was enacted in response to *Alyeska*, plaintiff's argument confuses the preclusive effect of the "American rule" with that of section 2412. Whereas the "American rule" finds its origin in the traditional judicial

deference of the courts to Congress' judgment in this area,[5] and, absent statutory exception, generally precludes recovery of attorneys' fees against *any* losing party, section 2412 simply preserves the sovereign immunity of the federal government against such awards. Indeed, the Supreme Court expressly recognized this distinction in *Alyeska*. In rejecting the private attorney general theory, the Court noted that judicial evisceration of the "American rule," even if approved, nonetheless would be insufficient to surmount the barrier to awards of attorneys' fees against the federal government that is presented by section 2412.[6]

Examination of the legislative history of the Awards Act is, at best, inconclusive.[7] Although plaintiff is correct in asserting that both the the House and Senate floor debates demonstrate that several Congressmen and Senators believed that the Awards Act would waive the federal government's immunity against awards of attorneys' fees,[8] this belief was not universally held.[9] Moreover, examination of both the Senate and House Reports on the Awards Act does not support the conclusion that the Act, as enacted, was intended to waive federal sovereign immunity. Although both reports state that section 1988 was fashioned after the attorneys' fee provisions of the 1964 Civil Rights Act, which allows recovery against the United States, the simple fact is that those fee provisions expressly waive federal sovereign immunity for attorneys' fees, whereas the Awards Act does not. 42 U.S.C. §§ 2000a-3(b); 2000e-5(k).[10]

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[5] *See Alyeska Pipeline Service Co. v. Wilderness Society*, 431 U.S. at 247–63, 95 S.Ct. at 1616–1624.

[6] 421 U.S. at 265–69, 95 S.Ct. at 1626–1627.

[7] *See NAACP v. Civiletti*, 609 F.2d 514, 519–20 (D.C.Cir.1979).

[8] 122 Cong.Rec.S 16251 (daily ed. Sept. 21, 1976) (comments of Senator Hugh Scott); 122 Cong.Rec.H 12163–64 (daily ed. Oct. 1, 1976) (comments of Congressman Railsback).

[9] *See* 122 Cong.Rec.H 12164 (daily ed. Oct. 1, 1976) comments of Congressman Drinan); 122 Cong.Rec.S 16490 (daily ed. Sept. 23, 1976 (letter of Congressman Rodino).

[10] *See* note 2, *supra*. The recent enactment of the Equal Access to Justice Act, Pub.L.No.96-481, § 201 *et seq.*, 49 U.S.L.W. 193–95 (Jan. 13, 1981) (to be codified in 28 U.S.C. § 2412), which, with exceptions, waives the fed-

An example of waiver by "clear implication" does appear in the Awards Act, although not in the context of actions brought under the civil rights statutes in question:

> [I]n any civil action or proceeding, by or on behalf of the United States of America to enforce, or charging a violation of, a provision of the United States Internal Revenue Code . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Certainly, this language does not contain an express waiver of federal sovereign immunity in tax cases. Such a waiver, however, is necessarily implied, because the above-quoted passage both limits its applicability to tax cases brought by the federal government, and specifically precludes the government from recovering attorneys' fees in those cases. Consequently, unless the language quoted above is to be rendered meaningless, a waiver in favor of prevailing taxpayers must be implied.[11]

[6] In contrast to tax cases, of course, civil rights cases may be brought both by the government and by private individuals. Consequently, that the Awards Act prevents the government from recovering attorneys' fees in those cases does not compel the conclusion that Congress must have intended to waive federal sovereign immunity. We hold, therefore, that the Awards Act does not provide for a waiver of federal sovereign immunity for attorneys' fees in cases brought against the federal government under the civil rights statutes in question.[12] In so holding, we are acutely mindful of the many compelling policy reasons in support of waiving federal sovereign immunity for attorneys' fees in civil rights cases. When the federal government violates constitutional rights, private enforcement is the only effective means of vindication. We

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eral government's immunity against awards of attorneys' fees in non-tort civil actions, is additional evidence that Congress did not intend that the Awards Act would have such an effect.

[11] *See also Natural Resources Defense Counsel, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973) for an application of this principle to the Clean Air Act, 42 U.S.C. § 7604.

believe, however, that these arguments are best addressed to Congress.[13]

IV.

Plaintiff cross-appeals from the district court's refusal to award attorneys' fees against the School Board. The district court explained its reasons for exempting the Board from liability for attorneys' fees as follows:

> [T]he only thing that necessitated the East Baton Rouge Parish School Board being a defendant in this suit was the fact that [HEW] . . . , improperly, illegally, and without regard for the rights of the [School Board] . . . threatened the School Board with deprivation of funds to which it was entitled if it permitted [plaintiff] to hold a meeting on school property.
>
> This threat was far in excess of any authority, under the circumstances, that [HEW] had. However, in view of the magnitude of the threat, the School Board was compelled, as a practical necessity, to comply with the wishes of [HEW].
>
> Under all of these circumstances, it was, and is, the opinion of this Court that it would be a miscarriage of justice to cast the [School Board] for any of the costs or attorney fees incurred in this suit.

In assessing the district court's conclusions, the chain of events may be outlined as follows: After plaintiff had secured

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[12] Both circuits that have addressed the issue have held that the Awards Act does not permit the recovery of attorneys' fees against the United States. *NAACP v. Civiletti*, 609 F.2d 514 (D.C.Cir. 1979), *cert. denied*, _____ U.S. _____, 100 S.Ct. 3012, 65 L.Ed.2d 1114 (1980); *Shannon v. HUD*, 577 F.2d 854 (3d Cir. 1978), *cert denied*, 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978).

We need not, and do not, decide whether the Awards Act contains a waiver of immunity in other cases to which it is applicable. As noted *supra*, a strong case can be made that such a waiver arises by necessary implication in favor of prevailing taxpayers in cases brought to enforce the federal tax laws.

[13] Indeed, these concerns motivated Congress to enact the Equal Access to Justice Act. *See* note 10, *supra*; Pub.L. 96-481, § 202(a).

permission from the Board to hold its rally on November 22, 1975, Dr. Bell of HEW sent two telegrams to the School Board, the first on November 19 and the second on November 21. Although the first telegram, which led to the Board's cancellation of the rally, informed the Board that use of the school grounds by plaintiff would result in retaliation by HEW, the second telegram acknowledged that HEW could not require the Board to act in an unconstitutional manner. Three months later, on February 19, 1976, the Board adopted the policy, admittedly unconstitutional, which was the subject of the injunction subsequently issued by the district court.

[7] In support of the district court's decision to exempt the School Board from liability for attorneys' fees, the Board invokes the principle that, although a district court ordinarily should award attorneys' fees to a prevailing party under the Awards Act, the court should not do so when "special circumstances" would render an award "unjust." *See* S.Rep.No. 94-1011, 94th Cong. 2d Sess. 5 (1976), *quoting Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). It does not appear, however, that such circumstances are present in this case.

[8] In holding that the Board was not at fault in refusing to allow plaintiff to use the school facilities, the district court apparently focused upon the circumstances surrounding the Board's November 20 cancellation of its earlier permission. This reasoning, however, ignores the events that occurred following the Board's decision to rescind its consent to plaintiff's use of the school facilities. Notwithstanding the pressures that the Board may have been under at the time it revoked its consent, and regardless of the extent to which it may be said that HEW's actions encouraged the Board to act in that manner, it is beyond dispute that, after almost three months to reflect upon the problem, the Board alone formulated and enforced the policy that later was held unconstitutional. In *Brown v. Culpepper*, 559 F.2d 274, 278 (5th Cir. 1977) this Court held that a "defendant's conduct, be it negligent or intentional, in good faith or bad, is irrelevant to an award of

attorneys' fees" under the Awards Act. This principle is fully applicable to the Board's adoption, albeit in good faith, of the unconstitutional policy. Similarly, that the Board adopted the policy pursuant to its official duty, and under the belief that it was necessary to satisfy its obligations under the statutes authorizing its federal funding, does not compel a finding of "special circumstances." Ultimately, the decision was one for the Board alone to make.[14] *See Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979).

[9] The "special circumstances" exception to the general rule of awarding attorneys' fees to a prevailing party is an extremely limited one, and is applied only in unusual cases. In *Riddell v. National Democratic Party*, 624 F.2d 539, 544-45 (5th Cir. 1980), this Court reviewed the decisions of other courts addressing the "special circumstances" exception and concluded that they fall into two categories: (1) situations in which, although clothed as a claim under section 1983, plaintiff's lawsuit sought to recover for what essentially was a private state law tort claim for money damages, and (2) those in which, although plaintiffs received the benefits sought to be obtained by the lawsuit, their efforts did not contribute to achieving those results. Like *Riddell*, "[t]he situation presented in this appeal does not involve any of these reasons for recognizing special circumstances sufficient to deny an award of attorneys' fees." 624 F.2d at 545.

[10, 11] The Board also argues that attorneys' fees should not be awarded in this case because the lawsuit was pending on the effective date of the Awards Act. In *Rainey v. Jackson State College*, 551 F.2d 672 (5th Cir. 1977), however, this Court held that the legislative history of the Awards Act authorizes retroactive fee awards unless such an award would be "manifestly unjust." *See also Hutto v. Finney*, 437 U.S.

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[14] It should be noted that the School Board was not completely powerless to resist HEW's threats. Regulations promulgated pursuant to the Emergency School Aid Act and Title VI provide for administrative procedures incident to the termination of federal funding. *See* 45 C.F.R. Parts 16, 80, 100-49, § 185.45.

678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Universal Amusement Co., Inc. v. Vance*, 559 F.2d 1286 (5th Cir. 1977), *cert. denied*, 442 U.S. 929, 99 S.Ct. 2859, 61 L.Ed.2d 296. The Board has not attempted to demonstrate how retroactive application of the Awards Act would be more burdensome or unfair in this case than it would in any other. Consequently, we hold that the district court erred in failing to award attorneys' fees against the School Board.[15]

Although the district court found that an award of $11,920.41 in attorneys' fees against HEW was reasonable, it does not necessarily follow that such an amount would be a reasonable award against the School Board. Moreover, in fixing the amount of attorneys' fees awardable to plaintiff, the district court failed to consider and make findings consistent with this Court's decision in *Johnson v. Georgia Highway Express Co., Inc.*, 488 F.2d 714 (5th Cir. 1974). We therefore reverse the award of $11,920.41 against HEW, and remand to the district court to determine what amount, if any, of attorneys' fees reasonably may be assessed against the Board.

REVERSED IN PART; REVERSED AND REMANDED IN PART.

GOLDBERG, Circuit Judge concurring in part and dissenting in part:

I concur in part IV of the majority's opinion, awarding attorneys' fees against the East Baton Rouge Parish School

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[15] In so holding, this Court is reminded of a quotation from Justice Douglas' dissenting opinion in *Dennis v. United States*, 341 U.S. 494, 71 S.Ct. 857, 905, 95 L.Ed. 1137 (1951):

> [W]e have trusted the common sense of our people to choose the doctrine true to our genius and to reject the rest. This has been the single outstanding tenet that has made our institutions the symbol of freedom and equality. We have deemed it more costly to liberty to suppress a despised minority than to let them vent their spleen.
>
> The first amendment does not permit this Court, any more than a federal or state governmental body, or anyone else, to selectively administer the law based upon the degree to which the beliefs of a particular individual or organization coincide with those of the public at large. Incompatible to traditional notions of democracy as one may find the principles espoused by plaintiff, it stands before this Court on equal footing with every other litigant.

Board. However, I dissent from parts I-III of the majority decision, finding the United States Department of Health, Education and Welfare (HEW) immune from paying attorneys' fees. My reasons for finding HEW liable for the payment of attorneys' fees have been fully detailed in Judge Wright's dissenting opinion in *NAACP v. Civiletti*, 609 F.2d 514, 521 (D.C.Cir.1979), *cert. denied*, ____ U.S. ____, 100 S.Ct. 3012, 65 L.Ed.2d 1114 (1980). It would be an unnecessary act to add a jot or tittle thereto.

APPENDIX C

J. SKELLY WRIGHT, Chief Judge, dissenting:

The Civil Rights Attorneys' Fees Awards Act of 1976, 42 U.S.C. § 1988 (1976), authorizes the award of attorneys' fees to "the prevailing party, other than the United States," in " 'any action or proceeding' to enforce [certain civil rights laws]."[1] The "necessary implication," see majority opinion 197 U.S.App.D.C. at ___, 609 F.2d at 516, from the language of the statute, the purposes behind its enactment, and its legislative history is that Congress intended to authorize fee awards against the United States under the Act.[2] Appellees in both cases before us are "prevailing parties" within the meaning of the Act. For these reasons, I would affirm the judgments of the District Court in both cases.

I.

The majority rightly points out that a party seeking to recover attorneys' fees against the United States must surmount the barrier posed by the doctrine of sovereign immu-

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[1] 42 U.S.C. § 1988 (1976) provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of public Law 92-318 [20 U.S.C. § 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964 [42 J.S.C. § 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(Brackets in original.) *NAACP v. Civiletti*, No. 78-1639, was brought under, *inter alia*, 42 U.S.C. § 1981, 1985 (1976). *Andrulis v. United States*, No. 78-2039, alleged discrimination in violation, *inter alia*, of 42 U.S.C. §§ 1981, 1985 (1976).

[2] Appellees in *Andrulis v. United States*, No. 78-2039, suggest two additional theories on which the award of attorneys' fees in that case might be sustained. *See* majority opinion, 197 U.S.App.D.C., at ___ n.12, 609 F.2d at 520 n.12. Because I conclude that § 1988 authorizes awards against the federal government, I do not reach these alternative arguments.

nity.[3] A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed.' " *United States v. Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 954, 47 L.Ed.2d 114 (1976), *quoting United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 23 L.Ed.2d 52 (1969). The Supreme Court in *Testan* described the test for the specificity required as "whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government * * *.' *Eastport S. S. Corp. v. United States*, 178 Ct.Cl., at 607, 372 F.2d, at 1009; *Mosca v. United States*, 189 Ct.Cl. 283, 290, 417 F.2d 1382, 1386 (1969), cert. denied, 399 U.S. 911 [90 S.Ct. 2197, 26 L.Ed.2d 565] (1970). We are not ready to tamper with these established principles * * *." 424 U.S. at 400, 96 S.Ct. at 954. Thus the question presented by these cases is whether Section 1988 "can fairly be interpreted as mandating [payment of attorneys' fees] by the Federal Government." The majority says that this may be done in one of two ways: (1) statutory language that specifically refers to the liability of the United States; and (2) necessary implication from the statutory context in which the fee provision arises. Majority opinion 197 U.S. App.D.C. at ___, 609 F.2d at 516-517. In my view, Section 1988 satisfies the latter test.

II.

Congress enacted Section 1988 in response to the Supreme Court decision in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). In *Alyeska* the Court held that federal courts do not have the power to award attorneys' fees to prevailing parties without specific statutory authorization. Prior to that decision lower

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[3] In this particular context this doctrine is reiterated in 28 U.S.C. § 2412 (1976), which proscribes fee awards against the United States except where specifically provided for by statute. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257-259, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Section 2412 states:

> Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title but not including the fees and expenses of attorneys[,] may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or official of the United States acting in his official capacity, in any court having jurisdiction of such action. * * *

federal courts had followed the fee-shifting policies Congress enacted in the attorneys' fees provisions of several civil rights statutes, for example, Titles II and VII of the Civil Rights Act of 1964,[4] 42 U.S.C. §§ 2000a-3(b), 2000e-5(k) (1976), and awarded attorneys' fees to prevailing parties in cases brought under other civil rights laws.[5] In Congress' view *Alyeska*

> created anomalous gaps in our civil rights laws whereby awards of fees are * * * suddenly unavailable in the most fundamental civil rights cases. For instance, fees are now authorized in an employment discrimination suit under Title VII * * *, but not in the same suit brought under 42 U.S.C. § 1981, which protects similar rights but involves fewer technical prerequisites to the filing of an action. * * *

S. Rep. No. 94-1011, 94th Cong., 2d Sess. 4 (1976). To eliminate these "anomalous gaps" Congress enacted the Civil Rights Attorneys' Fees Awards Act.

One theme that runs through the legislative history of the Act is the belief that attorneys' fees awards are crucial to vigorous enforcement of the civil rights statutes covered by Section 1988. Quoting the words of the late Supreme Court Justice Tom Clark, the Senate Report declared:

> "Not to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. * * * Without counsel fees the grant of Federal jurisdiction is but an empty gesture * * *. *Hall v. Cole*, 412 U.S. 1 [93 S.Ct. 1943, 36 L.Ed.2d 702] (1973), quoting 462 F.2d 777, 780-81 (2d Cir. 1972)."

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[4] Title II of the Civil Rights Act of 1964 provides:

> In any action commenced pursuant to this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

42 U.S.C. § 2000a-3(b) (1976).

[5] *See, e.g., Sims v. Amos*, 340 F.Supp. 691 (M.D.Ala.) (three-judge court), *aff'd*, 409 U.S. 942, 93 S.Ct. 290, 34 L.Ed.2d 215 (1972); *Stanford Daily v. Zurcher*, 366 F.Supp. 18 (N.D.Cal. 1973), *aff'd*, 550 F.2d 464 (9th Cir. 1977), *rev'd on other grounds*, 436 U.S. 547, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

S. Rep. No 94-1011, *supra*, at 3.[6] The award of attorneys' fees is crucial because these civil rights laws depend heavily on private enforcement.[7] And as this court has noted, the policy favoring private enforcement of the civil rights laws is particularly compelling when a federal agency or official is the defendant. Unlike the cases involving private or state defendants, the complainants are not merely "private attorneys general"; they are the only attorneys general.[8] The Department of Justice does not sue other federal government agencies for violations of the civil rights laws. Indeed, as in the instant cases, the Justice Department is frequently counsel for the other side. Thus the reasons behind the enactment of Section 1988 support the inference that it authorizes awards of attorneys' fees against the United States and caution against interpreting the statute in a manner that will frustrate Congress' purposes.[9] As this court has said, "[O]ur duty is to favor an

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[6] Senator Kennedy said in the Senate:

> It is a fundamental axiom of law that where there is a right the law should provide a remedy. Yet, without a provision to permit awards of attorneys' fees to successful parties, the rights secured by those civil rights laws covered by this act are hollow rights indeed. Enactment of this legislation would do much to assure all the citizens of this Nation that the words 'equal protection of law' mean what they say, and that Congress firmly intends that all our civil rights laws be vigorously enforced.

122 Cong.Rec. S16252 (daily ed. Sept. 21, 1976). Congressman Drinan remarked in the House:

> If Federal laws providing for the protection of civil constitutional rights are to be fully enforced, Congress must provide effective remedies for the vindication of those guarantees. Authorizing the award of reasonable counsel fees is an important tool for effectuating that purpose.

122 Cong.Rec. H12160 (daily ed. Oct. 1, 1976).

[7] S.Rep. No. 94-1011, 94th Cong., 2d Sess. 2 (1976); H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976).

[8] *Parker v. Califano*, 182 U.S.App.D.C. 322, 333, 561 F.2d 320, 331 (1977).

[9] Courts have construed civil rights attorneys' fees provisions very broadly in order to further Congress' purposes. Thus the Supreme Court held in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968), that notwithstanding the statutory language that the District Court "in its discretion" may award costs to the prevailing party, the purpose of encouraging private enforcement dictates that a prevailing party should recover attorneys' fees "unless special circumstances would render such an award unjust." *Id.* at 402, 88 S.Ct. at 966. In *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), the court observed: "This Court, as part of its obligation 'to make sure

interpretation which would render the statutory design effective in terms of the policies behind its enactment and to avoid an interpretation which would make such policies more difficult of fulfillment, particularly where * * * that interpretation is consistent with the plain language of the statute." *National Petroleum Refiners Ass'n v. FTC*, 157 U.S.App.D.C. 83, 90, 482 F.2d 672, 689 (1973), *cert. denied*, 415 U.S. 951, 94 S.Ct. 1475, 39 L.Ed.2d 567 (1974). This is particularly essential where civil rights statutes are involved. Courts must accord such a statute "a sweep as broad as its language." *United States v. Price*, 383 U.S. 787, 801, 86 S.Ct. 1152, 1160, 16 L.Ed.2d 267 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968); *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971).

III.

Congress used very broad language when it enacted Section 1988. The Act authorizes the award of attorneys' fees in "*any* action or proceeding." (Emphasis added.) The Supreme Court recently confirmed the Acts' broad reach when it held in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978), that the language of the statute was sufficient to overcome the states' Eleventh Amendment immunity. In so holding the Court said:

> The Act itself could not be broader. It applies to "any" action brought to enforce certain civil rights laws. It contains no hint of an exception for States defending injunction actions * * *.

Id. at 694, 98 S.Ct. at 2575. The language of the Act is also broad enough to apply to actions against the federal government. While the Act does not specifically mention the liability

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that Title VII works,' has liberally applied the attorney's fees provision of Title VII, recognizing the importance of private enforcement of civil rights legislation." *Id.* at 716 (footnote omitted) (*quoting Culpepper v. Reynolds Metals Co.*, 421 F.2d 888, 891 n.3 (5th Cir. 1970)).

of the United States in civil rights cases,[10] not every attorneys' fees provision that has been found to authorize fee awards against the federal government has specifically mentioned the liability of the United States.

For example, in *Natural Resources Defense Council, Inc. v. EPA*, 484 F.2d 1331 (1st Cir. 1973), the First Circuit held that Section 304(d) of the Clean Air Act, now codified at 42 U.S.C. § 7604(d) (Supp. I 1977), authorized an award of attorneys' fees against the United States. The court rejected the Government's claim that fee awards against the federal government were not authorized because the Act's "any party" States.[11] Moreover, this court recently held, without opposi-

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[10] Section 1988 authorizes fee awards to the prevailing party in "any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, * * * the * * * the Internal Revenue Code * * *." The Government argues that this is the only specific waiver in § 1988, and that the failure to mention the United States in the civil rights portion of § 1988 as well shows that the "any action" reference does not apply to the United States.

This argument is unpersuasive. The IRS section was an amendment to the original bill sponsored by Senator Allen. It was accepted by the bill's sponsors as a compromise to end a filibuster of the bill led by Senator Allen. The purpose of the Allen amendment was to provide relief to taxpayers who are being harassed by the Government.

> We know all too well the proclivity of the IRS to harass taxpayers * * *. [I]f the Government harasses a taxpayer, * * * then the Government should be required to pay that attorney fee.

122 Cong.Rec. S16428 (daily ed. Sept. 22, 1976) (remarks of Sen. Allen). Since the Allen amendment only authorizes fee awards in certain actions *brought by the IRS*, it could not have used the term "any action" or "any action under the Internal Revenue Code." Hence, by mentioning the United States specifically in the IRS portion of § 1988 Congress merely intended to make it plain that § 1988 does not apply to all tax cases. (On the other hand, in enacting the civil rights fee provision "Congress firmly intend[ed] that *all* our civil rights laws be viogorously enforced." 122 Cong.Rec. S16252 (daily ed. Sept. 21, 1976) (remarks of Sen. Kennedy) (emphasis added).

Indeed, a straightforward reading of the statute suggests the exact opposite of the Government's contention. The phrase "any action or proceeding" is used twice in the statute. The natural inference is that the phrase has the same meaning and coverage in the two uses (this explains why the limiting language "by or on behalf of the United States of America" was necessary). Since the phrase unmistakably encompasses awards against the United States in the IRS context, it is reasonable to assume that the same holds for the civil rights use.

[11] Section 304(d) provides:

> The court, in issuing any final order in any action brought pur-

tion from the Government, that the recent amendment of Section 307 of the Clean Air Act, 42 U.S.C. § 7607(f) (Supp. I 1977), to permit fee awards "[i]n any judicial proceeding under this section"[12] authorizes fee awards against the federal government. *Sierra Club v. EPA*, D.C. Cir. No. 76-1037, order of April 27, 1979 (award of attorneys' fees of $11,760 to Sierra Club ordered paid by EPA) (case consolidated with *ASARCO v. EPA*, D.C. Cir. No. 76-1030). Equally instructive is the fact that Congress only recently enacted Section 505(b) of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub.L. No. 95-602, 92 Stat. 2983, an attorneys' fees provision which, in the words of its sponsor, "parallels the Civil Rights Attorneys' Fees Awards Act of 1976 * * *." 124 Cong.Rec. S15590 (daily ed. Sept. 20, 1978) (remarks of Sen. Cranston). The language of Section 505(b) is virtually the same as that of Section 1988.[13] Section 505(b)'s sponsor and the accompanying Committee Reports made it clear that this attorneys' fee provision is to be used to vindicate rights against the federal government.[14]

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suant to subsection (a) of this section, may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate. * * *

42 U.S.C. § 7604(d) (Supp. I 1977).

[12] 42 U.S.C. § 7607(f) (Supp. I 1977) states:

In any judicial proceeding under this section, the court may award costs of litigation (including reasonable attorney and expert witness fees) whenever, it determines that such award is appropriate.

[13] Section 505(b) provides:

In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

[14] Senator Cranston, in introducing the attorneys' fees provision, said:

Mr. President, the rights extended to handicapped individuals under title V of the Rehabilitation Act of 1973—Federal Government employment, physical accessibility in public buildings, employment under Federal contracts, and non-discrimination under Federal grants —are and will continue to be in need of constant vigilance by handicapped individuals to assure compliance. Pri[va]te enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and enforcement is uniform. The availability of attorneys' fees should assist substantially in this respect. * * *

124 Cong.Rec. S15590 (daily ed. Sept. 20, 1978). *See also* S.Rep. No. 95-890, 95th Cong., 2d Sess. 19 (1978).

If Congress thought Section 505(b) was precise enough to apply to the United States, then the same may be said of the statute after which it was modeled, Section 1988.

IV.

The legislative history of Section 1988 provides substantial support for the conclusion that Congress intended to authorize fee awards against the United States under the Act.

A.

There are numerous indications in the Senate and House Reports that Congress intended Section 1988 to have substantially the same coverage as the attorneys' fees provisions of the 1964 Civil Rights Act which apply to the federal government. Both Reports stressed the fact that the legislation was designed to make our civil rights laws consistent. The Senate Report said: "The purpose of this amendment is to remedy anomalous gaps in our civil rights laws created by [the *Alyeska* decision], and to achieve consistency on our civil rights laws." S.Rep. No. 94-1011, *supra*, at 1. In a similar vein the House Report stated: "In order to achieve uniformity in the remedies provided by Federal laws guaranteeing civil and constitutional rights, it is necessary to add an attorney fee authorization to those civil rights acts which do not presently contain such a provision." H.R.Rep. No. 94-1558, 94th Cong., 2d Sess. 1 (1976). Both Reports stressed that Section 1988 was fashioned after the attorneys' fees provisions of the 1964 Civil Rights Act. The Senate Report noted: "S. 2278 follows the language of Titles II and VII of the Civil Rights Act of 1964 * * *." S.Rep. No. 94-1011, *supra*, at 2. The House Report stated: "H.R. 15460 tracks the language of the counsel fee provisions of Titles II and VII of the Civil Rights Act of 1964 * * *." H.R.Rep. No. 94-1558, *supra*, at 5. The Reports also explained that the standards for awarding fees under Section 1988 would "be generally the same as under the fee provisions of the 1964 Civil Rights Act." S.Rep. No. 94-1011, *supra*, at 4. The natural inference from all these factors is that Congress intended Section 1988's coverage to be the same

as the coverage of the fee provisions of the 1964 Act. That Congress omitted the language specifically referring to the liability of the United States for attorneys' fees is not significant.[15] Given all the indications that Congress intended Section 1988 to be just like the other civil rights attorneys' fees provisions, it is reasonable to assume that if Congress had intended to depart from the norm by immunizing the federal government from liability it would have done so explicitly.

The majority agrees that another section of the House Report contains further support for the view that Section 1988 applies to the federal government. *See* majority opinion, 197 U.S.App.D.C. at _____, 609 F.2d at 517-518. In discussing the issue of fee awards to prevailing defendants, the House Report pointed out:

> [I]t should further be noted that governmental officials are frequently the defendants in cases brought under the statutes covered by H.R. 15460 [the bill which became 1988]. *See, e.g.*, * * * *Hills v. Gautreaux*, [425 U.S. 284, 96 S.Ct. 1538, 47 L.Ed.2d 792 (1976). Such governmental entities and officials have substantial resources available to them through funds in the common treasury, including the taxes paid by the plaintiffs themselves. * * * The greater resources available to governments provide an ample base from which fees can be awarded to the prevailing plaintiff in suits against governmental officials or entities.

H.R.Rep. No. 94-1558, *supra*, at 7 (footnote omitted). By citing *Hills v. Gautreaux*, a case involving Title VI claim brought against a federal cabinet officer, as an example of a case in which a government official could be a defendant in a civil rights suit, and by pointing out that such officials would be liable for fee awards under Section 1988, the Report supports the inference that Congress intended the federal government to be liable for fee awards.

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[15] The inference that the omission was deliberate and significant would have been more plausible if the same Congress had drafted the two statutes, or if in place of the "any party" language the fee provisions listed the parties covered, and the United States was included in one list but not in the other.

B.

Both the majority in its opinion and the Government in its briefs have studiously avoided any mention of the hearings on the legislation that became Section 1988. This is unfortunate because the report of these hearings shows that even the Department of Justice, represented by Rex E. Lee, Assistant Attorney General for the Civil Division, recognized that the legislation before the House Subcommittee would authorize fee awards against the federal government. In his testimony *in support* of the legislation, Mr. Lee said:

> H.R. 8220 would authorize the awarding of attorneys' fees to a prevailing plaintiff in actions brought under certain civil rights statutes. *Actions under the statutes involved have been brought against both federal officers and private individuals.*
>
> * * * * * *
>
> H.R. 9552 authorizes the awarding of attorneys' fees as a matter of discretion in certain civil rights litigation. The prevailing party, other than the United States, may recover attorneys' fees.
>
> Thus, H.R. 9552 applies to *all plaintiffs or defendants except to the United States to the extent that it is a prevailing party.*

Awarding of Attorneys' Fees, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 176-177 (1975) (emphasis added) (hereinafter "House Hearings").[16]

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[16] Mr. Lee went on:

> [The Department of Justice expresses] support in principle for H.R. 8220 and H.R. 9552, awarding of attorneys' fees to a prevailing party in civil rights actions under the revised statutes (sections 1981, 1982, and 1983, 1985, and 1986, of title 42, United States Code).

Awarding of Attorneys' Fees, *Hearings Before the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice*, 94th Cong., 1st Sess. 179 (1975) (hereinafter "House Hearings"). H.R. 8220 and H.R. 9552 differed from each other only in that the former made the award of attorneys' fees mandatory whereas the latter made it discretionary. Mr. Lee favored discretionary awards and also had reservations about fee awards in every § 1983 case. Thus he supported the bills "in principle." *See* House Hearings at 176-180.

Equally revealing is the statement by Congressman Drinan. In introducing H.R. 9552 and several other attorneys' fees provisions he told the Subcommittee that:

> [U]nder these bills the Federal government could never recover its attorney fees. *On the other hand, it would be required to pay the counsel fees of a private prevailing party, which is prohibited generally by current law (see 28 U.S.C. 2412). These bills, if enacted, would be exceptions to the general prohibition in 28 U.S.C. 2412. That section need not be amended, however, since it now states: Except as otherwise specifically provided by statute. . . .*"

House Hearings at 53 (emphasis added). H.R. 9552 became the House version of the legislation that was enacted as Section 1988. The language of H.R. 9552 was virtually identical to Section 1988 as it passed Congress.[17] To be sure, courts are generally wary of testimony before committee hearings as aids to statutory construction. *See S&E Contractors, Inc. v. United States*, 406 U.S. 1, 13 n.9, 92 S.Ct. 1411, 1418-1419 n.9, 31 L.Ed.2d 658 (1972). However, courts are willing to attach great weight to such testimony when it consists of "precise analyses of statutory phrases by the sponsors of the proposed laws." *Id.* Congressman Drinan introduced H.R. 9552 to the House Judiciary Subcommittee and was the chief sponsor of Section 1988 in the House. Both the House

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[17] H.R. 9552 provided:

> In any action to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorney fees as part of the costs.

House Hearings, *supra* note 16, at 244. This bill was approved by the House Judiciary Subcommittee with a technical amendment which conformed it to the Senate version, S. 2278, which at the time had cleared the Senate Judiciary Committee and was awaiting action by the full Senate. H.R. 9552 was subsequently approved by the House Judiciary Committee with an amendment that added title IX of Public Law No. 92-318 to the statutes covered by the bill. A clean bill, H.R. 15460, was then reported to the full House. Other than the addition of title IX the only differences between H.R. 9552 and H.R. 15460 (the clean bill) were technical changes, not affecting the substance, made on the advice of the House Parliamentarian and staff and legislative counsel. *See* H.R. Rep. No. 94-1558, *supra* note 7, at 3-4 & n.4. Time pressures made it necessary for the House to adopt the Senate version, S. 2278, in place of H.R. 15460. However, the two bills were nearly identical.

Report and the floor debates referred to Mr. Lee as a principal source of interpretation for Section 1988.[18]

C.

Much of the Government's purported support for its claim that Section 1988 does not authorize awards against the United States derives from the floor debates. However, fairly considered the debates offer the Government little support. Rather, they support the conclusion that Congress intended Section 1988 to apply to the United States.

1. *The Senate Debates*

In his remarks in support of the bill Senator Hugh Scott, who opened the debate on S. 2278, explained that its enactment would "assure that attorney's fees will be available in suits brought under the reconstruction-era civil rights laws, * * * *in the same fashion and to the same extent as the statutes presently provide in cases brought under title VII of the 1964 Civil Rights Act.*" 122 Cong.Rec. S16251 (daily ed. Sept. 21, 1976) (emphasis added). Since the United States is liable for attorneys' fees in Title VII cases, the natural inference from this is that fees may be awarded against the United States under Section 1988.

The Government relies on an amendent offered by Senator Helms, an opponent of the bill, which purportedly shows that he understood the bill not to apply to the United States. However, a closer examination of the Helms amendment shows that Senator Helms misunderstood the import of the phrase "other than the United States." Section 1988 authorizes the award of fees to "the prevailing party, other than the United States * * *." The amendment would have inserted the phrase "or any State * * * or any political subdivision thereof" after the latter phrase. 122 Cong.Rec. S16433 (daily ed. Sept. 22, 1976). But the effect of this addition would have

[18] *See, eg.*, H.R.Rep. No. 94-1558, *supra* note 7, at 6; 122 Cong.Rec. H12162 (daily ed. Oct. 1, 1976) (remarks of Rep. Kastenmeier).

been to deny *both* the United States *and* state and local governments the right to recover attorneys' fees if they were prevailing parties. On the other hand, it is significant that Senator Allen, a principal opponent of the bill,[19] understood it to permit awards against the federal government. He unsuccessfully sponsored an amendment that would have limited the liability of the United States to situations in which an official of the federal government "has acted in a contumacious or vexatious manner." 122 Cong.Rec. S16567 (daily ed. Sept. 24, 1976).[20]

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[19] Senator Allen led a filibuster against the bill which he ended only when the bill's sponsors compromised by accepting an amendment that he proposed. *See* 122 Cong.Rec. S17050 (daily ed. Sept. 29, 1976); note 10 *supra*.

[20] The Government points to a Congressional Budget Office (CBO) "estimate" (*see* S.Rep. No. 94-1011, *supra* note 7, at 7; H.R.Rep. No. 94-1558, *supra* note 7, at 10) that enactment of the bill would result in no additional costs to the Government. This "no cost" feature of the bill was referred to in the floor debates. A few points are worth noting in assessing the significance of this "no additional costs" estimate. First, it appears that attorney's fees awards against the Government are paid from the Department's existing appropriations. Mr. Lee confirmed this in his testimony before the House Judiciary Subcommittee. He said:

> [A]ttorneys' fees awards * * * necessarily *reduce* available resources, with concommitant impact on other Government programs.

House Hearings, *supra* note 16, at 178 (emphasis added). Thus the CBO did not foresee any additional costs. (*i.e.*, new appropriations) to the Government. Second, it is significant that although the United States is liable for attorneys' fees under other civil rights statutes passed prior to § 1988, and is liable under § 1988 to prevailing defendants in some internal revenue cases, there is no line item in the Justice Department's appropriations for such payments. These payments are apparently made from a general fund for "expenses necessary for the legal activities of the Department of Justice * * *." Pub.L. No. 95-431, 92 Stat. 1026. Third, it would have been incongruous for CBO or Congress to "estimate" the expenditures required to compensate individuals for the federal government's abridgement of civil rights laws. Finally, the amounts involved are likely to be minimal unless one assumes wholesale violations of civil rights laws by federal government agencies or officials. In light of all these factors, and given the other indications that Congress intended § 1988 to apply to the United States, it is reasonable to conclude that the CBS "estimate" is not incompatible with the conclusion that § 1988 authorizes awards against the federal government.

Much the same explanation can be given to a letter written by Congressman Rodino, Chairman of the House Judiciary Committee, introduced during the Senate debate on a proposed amendment to S. 2278 that would have subjected the United States to broad liability for tax cases. In the letter Mr. Rodino expressed concern that the amendment could jeopardize Administration support for the bill and weaken its chances for enactment. He said:

> I fear that Senator Goldwater's amendment—lacking a careful

2. *The House Debates*

The majority acknowledges that there is support in the report of the floor debates in the House for the conclusion that Section 1988 applies to the United States. In the only portion of the House debates that directly addressed the question of the liability of the United States under Section 1988, Congressman Railsback, the ranking Republican on the House Judiciary Subcommittee which drafted the House version of the legislation that became Section 1988 and a strong supporter of the bill, made it quite clear that it applied to the United States. The colloquy between Mr. Railsback and Mr. Quie is very revealing.

Mr. Quie. * * *

I would like to ask the minority member, the gentleman from Illinois (Mr. Railsback), a question. * * *

First, I would like to ask if the U.S. Government is the

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analysis by the Administration, and in light of the Administration's prior position on another IRS attorney fee provision—will jeopardize the * * * Act * * *. S. 2278 is presently a very narrow bill intended to enable private enforcement of civil rights acts. It does not involve federal spending, and has specifically been supported by the Administration at a hearing before [a] House Subcommittee * * *.

The Committee is presently studying other bills, like Senator Goldwater's, which would go far beyond the "American Rule," or the "private attorney general" exception to it, and which may allow recovery against the Federal Government. We hope to take action next Congress on such bills. However, I fear that quick action on the Goldwater amendment, which goes far beyond the narrow provisions of S. [2]278, would defeat the bill.

122 Cong.Rec. S16490 (daily ed. Sept. 23, 1976). The majority cites this letter as evidence that some members of Congress did not think that S.2278 applied to the United States. Majority opinion, 197 U.S.App.D.C. at — n.11, 609 F.2d at 519 n.11. While it is possible to interpret Mr. Rodino's letter in this manner, it is equally plausible that it merely reflects his expectation that the federal government will not often be guilty of violating civil rights laws and, hence, fee awards against the United States will be minimal. In this regard it is significant that Congressman Rodino did not challenge Congressman Railsback's statement, made in the House at a time when the debate specifically focused on the question of the liability of the United States, that § 1988 allows recovery of attorney's fees from the federal government. *See* text at notes 21-22 *infra*. Congressman Rodino's real concern was with the broad scope of the proposed amendment—its possible impact on Administration support and therefore on the bill's chances for enactment—not the question whether § 1988 allows recovery against the federal government.

plaintiff in a civil rights case against an individual or corporation, can that individual or corporation as the prevailing party be awarded attorney's fees against the U.S. Government?

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> Mr. Railsback. * * * [A]s I read the bill before us, my answer would be yes. What we do is limit the United States from recovering *but we do not limit the rights of other prevailing parties to recover in the event the United States would be the plaintiff in an action such as described in the bill.*

122 Cong.Rec. H12163 (daily ed. Oct. 1, 1976) (emphasis added). Mr. Railsback further explained:

> [A]s I read the bill before us, we limit the right of the U.S. Government to recover, *we do not limit in a case where the United States would be the plaintiff suing a defendant, we do not limit the defendant's right to recover.* Where the judge might decide that a prevailing defendant should recover, *we do not limit the defendant from recovering from the United States in civil rights cases.*

Id. at 12163-12164 (emphasis added).[21]

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[21] The Government attempts to explain Congressman Railsback's statement as due to confusion caused by the House's "eleventh hour" consideration of the bill. In addition, it suggests that this statement was immediately refuted by Congressman Drinan, the bill's sponsor, when the latter remarked:

> [It] is very clearly limited. If a Federal judge came to that conclusion it would indeed be a most unusual case. This provision was inserted into the Senate bill. It did not originate with the House Judiciary Committee. It does give a remedy for the most extraordinary case where the defense could assert and prove to a Federal judge that an IRS case brought against him was so vexatious and so without merit that he should get compensation.

Id. at 12164. However, it seems that if there was any confusion it was on the part of Congressman Drinan. He apparently thought that Congressman Railsback was referring to the amendment to the bill, adopted in the Senate, which made the United States liable to prevailing defendants in certain tax cases. *See* note 10 *supra*. Congressman Railsback was not in fact referring to this provision. When Congressman Railsback reiterated his understanding that the bill authorized awards against the United States, his statement was not challenged by Congressman Rodino who shared the view that the Act allowed awards against the federal government. *See* text at notes 17-18 *supra*.

Another colloquy between Congressman Railsback and Congressman Quie is also quite plain in its implications.

> Mr. Quie. * * * [I]f the United States is the plaintiff and loses a civil rights case against a school district or college, can that school district or college as the prevailing party be awarded attorneys fees against the U.S. Government?
>
> Mr. Railsback. * * * [A]gain it would be in the discretion of the court and *nowhere in the bill do we prevent a school district or college from recovering reasonable attorneys fees, even in a case where the United States is a party plaintiff.*

Id. at 12164 (emphasis added). This is the type of "precise analyses of statutory phrases by the sponsors of proposed laws" which courts give significant weight. *S&E Contractors, Inc. v. United States, supra*, 406 U.S. at 13 n.9, 92 S.Ct. at 1418, 1419 n.9. I am at a loss to understand how the majority can maintain, in the face of evidence of this sort, that the legislative history of the Act does not clearly show that Congress intended Section 1988 to apply to the United States.[22]

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[22] The Government relies on, and the majority cites with approval, court decisions that have held that § 1988 does not apply to the United States, *Shannon v. HUD*, 433 F.Supp. 249 (E.D. Pa.1977), *aff'd per curiam*, 577 F.2d 854 (3d Cir.), *cert. denied*, 439 U.S. 1000, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978); *Southeast Legal Defense Group [SLDG] v. Adams*, 436 F.Supp. 891 (D.Or.1977). The District Courts that decided the *Shannon* and *SLDG* cases did not have the benefit of the Supreme Court's comment in *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) about the broad reach of § 1988. The Third Circuit in its brief *per curiam* did not address this point. Moreover, these courts appear to have been under the mistaken impression that the only attorneys' fees provisions that have been applied to the United States are those that specifically mention the United States by name. But as the majority of this court points out, an intention to authorize such awards may be inferred by "necessary implication" from the context in which a fee provision is found. *See* text at notes 11-14 *supra*; majority opinion, 197 U.S.App.D.C. at —, 609 F.2d at 516. Finally, the *SLDG* court misconstrued § 1988's legislative history (the Third Circuit's *per curiam* opinion in *Shannon* cited *SLDG* with approval, 577 F.2d at 856). The *SLDG* court noted that the Senate rejected an amendment offered by Senator Helms which would have made the United States liable for attorneys' fees to prevailing parties in every civil case and to acquitted criminal defendants. It concluded from this that Congress declined the opportunity to authorize fee awards in civil rights cases under § 1988. 436 F.Supp. at 893. This conclusion is erroneous. Senator Helms was an opponent of the bill and his aim in offering the amendment was to lessen the bill's chances for enactment by broadening the Government's scope of liability. The Administration for one was opposed

V.

Only "prevailing parties" may be awarded attorneys' fees under Section 1988. The Government concedes that appellees *in Andrulis v. United States*, No. 78-2039, are prevailing parties. But it challenges the District Court's ruling that appellees in *NAACP v. Civiletti*, No. 78-1639, are prevailing parties. The majority does not reach this issue since it finds that Section 1988 does not apply to the federal government. Because I find Section 1988 applicable to the United States, I will briefly examine the Government's claim.

The case arose out of the fatal shooting of Carnell Russ, a black man, by a white Arkansas law enforcement officer while Russ was detained for an alleged traffic violation. The officer was tried for manslaughter and acquitted by a state court jury. The Justice Department reviewed the transcript of the trial and FBI reports and decided against prosecuting the officer under the federal criminal civil rights statute, 18 U.S.C. § 242 (1976).

Subsequently, the Russ family and the NAACP brought suit under the Civil Rights Act, 42 U.S.C. §§ 1981 and 1985 (1976), challenging the adequacy of the federal investigation and the decision not to prosecute. The nub of their claim was that the Justice Department illegally deferred to the state proceedings pursuant to a policy, established in 1959 by then Attorney General Rogers, of not initiating a federal prosecution after a state prosecution for the same act, unless there were compelling reasons. Plaintiffs sought both damages and injunctive relief.[23]

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to such broad liability. *See* House Hearings, *supra* note 16, at 177-182 (testimony of Mr. Lee). The fact that Congress declined to enact such a broad attorneys' fees provision can in no way be interpreted as a rejection of the Government's liability under the more limited legislation being considered.

[23] The District Court, characterized the primary objective of plaintiffs' claim as "ensur[ing] that the * * * Department of Justice [does] not fail to vindicate federally protected interests by not prosecuting local law enforcement officers alleged to have violated federal criminal civil rights statutes simply because state or local authorities had already prosecuted those officers for state or local offenses arising from the same conduct." Joint Appendix (JA) 279.

While this suit was pending, then Attorney General Bell issued in February 1977 a memorandum modifying the 1959 policy against dual prosecutions. He announced a new policy of evaluating "each and every allegation of a violation of the civil rights laws * * * on its own merits," without regard to related state enforcement action. Joint Appendix (JA) 277. Both parties agreed that the Bell memorandum effectively mooted the lawsuit, and they filed a joint motion to dismiss. In granting the motion the District Court agreed with the parties that the Bell memorandum was in accord "with the policy objectives which underlie this lawsuit * * *." JA 279, 282-283. Plaintiffs subsequently filed a motion for and were awarded attorneys' fees under 42 U.S.C. § 1988 (1976).

The award of attorneys' fees under Section 1988 is left to the discretion of the court. As such the District Court's judgment should be reversed only for an abuse of discretion. *Morrow v. Dillard*, 580 F.2d 1284, 1300 (5th Cir. 1978); *Sandford v. R. L. Coleman Realty Co.*, 573 F.2d 173, 179 (4th Cir. 1978). The District Court properly identified the test for a prevailing party as "whether that party has accomplished the objectives of his litigation. *Parker v. Matthews*, 411 F.Supp. 1059, 1064 (D.D.C. 1976), *aff'd sub nom. Parker v. Califano*, [182 U.S. App.D.C. 322], 561 F.2d 320 (D.C. Cir. 1977)." JA 283.[24] The District Court found that the plaintiffs' "persistent prosecution of this action was a strong catalytic factor in the issuance of the Bell memorandum." JA 284. It also found that the plaintiffs had achieved the policy objective set out in their second amended complaint—publicizing and correcting the Justice Department's policy of deferring to prior state civil rights prosecutions. *Id.*

To be sure, fathoming the Attorney General's motives is not the easiest of tasks. Nevertheless, I conclude, after a careful review of the record, that the District Court did not abuse

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[24] It is plain from the legislative history of § 1988 that a litigant may be a prevailing party even though the lawsuit was not prosecuted to a full trial on the merits. *See* S.Rep. No. 94-1011, *supra* note 7, at 5; H.R.Rep. No. 94-1558, *supra* note 7, at 7.

its discretion in awarding attorneys' fees to appellees as "prevailing parties."

VI.

The attorneys' fees provisions of the civil rights statutes were enacted "to encourage individuals injured by racial discrimination to seek judicial relief * * *." *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968). Courts construing these attorney's fees provisions must strive to further this goal. The decision by the majority of this court will defeat Congress' purpose in enacting Section 1988 insofar as suits against the federal government are concerned. An examination of the purposes, language, and legislative history of Section 1988 provides ample support for the conclusion that Congress intended to authorize attorneys' fees awards against the United States under the Act.

I respectfully dissent.

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No. 80-2086

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners

v.

KNIGHTS OF THE KU KLUX KLAN,
REALM OF LOUISIANA, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE FOR RESPONDENT, KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA

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No. 80-2086

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

EAST BATON ROUGE PARISH SCHOOL BOARD, ET AL.,
Petitioners

v.

KNIGHTS OF THE KU KLUX KLAN,
REALM OF LOUISIANA, ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM IN RESPONSE FOR RESPONDENT, KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA

Respondent, Knights of the Ku Klux Klan, Realm of Louisiana (KKK), was the prevailing party in obtaining preliminary and permanent injunctive relief in federal district court against petitioner, East Baton Rouge Parish School Board (School Board), and the U.S. Department of Health, Education and Welfare (HEW) pursuant to 42 U.S.C. §1983 and the First and Fourteenth Amendments of the U.S. Constitution. (Pet.App. A-1 to A-3.) Subsequently, pursuant to the Civil Rights Attorney's Fees Awards Act of 1976 (Awards

Act), 42 U.S.C. §1988, the trial court awarded KKK $11,681.25 in attorney's fees and $239.16 in costs against HEW and refused to award any fees and costs against the School Board. (Pet.App. A-5.) The court of appeals reversed, holding that the Awards Act did not authorize awards of attorney's fees against the federal government and that the School Board was responsible for the fees and costs, to be determined on remand by the district court, because there were no "special circumstances" which would render such an award against the School Board "unjust."[1] (Pet.App. A-11, 15-17.) The court below rejected the School Board's contention that applying the Awards Act retroactively to the School Board would be "manifestly unjust." (Pet.App. A-17.)

QUESTIONS PRESENTED

The School Board's petition for certiorari seeks review of the following questions:

(1) Is the KKK, the prevailing party, entitled to an award of attorney's fees against the federal government?

(2) Did the court of appeals err in finding that there were no "special circumstances" which would render an award of attorney's fees against the School Board unjust?

(3) Did the court of appeals err in finding that retroactive application of the Awards Act against the School Board would not be "manifestly unjust"?

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1. 643 F.2d 1034 (5th Cir. 1981). HEW did not appeal the award of costs against the federal government. (Fed.Memo. 4. See also Pet.App. A-17.)

ARGUMENT

Question 1, whether fees should be awarded against the federal government, merits a summary reversal and remand to the district court for reconsideration in light of the Equal Access to Justice Act (Justice Act), Pub.L.No. 96-481, §§201-08, 94 Stat. 2325-30, effective October 1, 1981. Questions 2 and 3, whether fees should be awarded against the School Board, present nothing of merit to be reviewed.

1. If the Court is considering granting the writ application based solely on the issue of whether fees should be awarded against the federal government, respondent KKK would agree with petitioner that certiorari should be granted, but not on the basis of the Awards Act.[2] The issue is now controlled by the recently enacted Equal Access to Justice Act. This Act authorizes attorney's fees against the federal government in cases pending as of October 1, 1981. Justice Act §§204, 206.

A pending case would include those cases where a timely filed petition for certiorari was pending to review a decision of a court of appeals, as in this case.[3] The School Board effectively will be deprived of the benefits of this new Act unless the Court grants certiorari and reverses and remands.

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2. The Court recently denied writ applications on the issue of whether the Awards Act, as it existed prior to October 1, 1981, authorized fee awards against the federal government. **See NAACP v. Civiletti**, 609 F.2d 514 (D.C. Cir. 1979), **cert. denied** 447 U.S. 922, 100 S.Ct. 3012, 65 L.Ed. 2d 1114 (1980); **Shannon v. HUD**, 577 F.2d 854 (3rd Cir. 1978), **cert. denied** 439 U.S. 1002, 99 S.Ct. 611, 58 L.Ed.2d 677 (1978). Respondent KKK agrees with the federal respondent that because of the enactment of the Justice Act, "there is no need for the Court to consider the issue in the previous statutory context." (Fed.Memo. 6.)

3. **See Hutto v. Finney**, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522, 537 (1978); **Robinson v. Kimbrough**, 652 F.2d 458, 464-65 (5th Cir. 1981); **Corpus v. Estelle**, 605 F.2d 175, 177 (5th Cir. 1979), **cert. denied** 445 U.S. 919, 100 S.Ct. 1284, 63 L.Ed.2d 605 (1980); **Sethy v. Alameda Cty. Water Dist.**, 602 F.2d 894, 897 (9th Cir. 1979), **cert. denied** 444 U.S. 1046, 100 S.Ct. 734, 62 L.Ed.2d 731 (1980); **Rainey v. Jackson State College**, 551 F.2d 672, 675-76 (5th Cir. 1977). **See also Perzinski v. Chevron Chemical Co.**, 503 F.2d 654, 657 (7th Cir. 1974).

2. The petition discloses no special or important reasons for reviewing the factual determination below that there were not any "special circumstances" which would render an award of attorney's fees against the School Board "unjust." (Pet. App. A-15 to A-17.) The court of appeals found that it was "beyond dispute that, after almost three months to reflect upon the problem, the Board alone formulated and enforced the [school-use] policy that later was held unconstitutional."[4] (Pet.App. A-15.)

The School Board does not question the well-established rule that a prevailing party under the Awards Act "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."[5] (Pet.10, 11.) Application of this principle has presented no problem to the courts of appeal.[6]

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4. The court of appeals also "noted that the School Board was not completely powerless to resist HEW's threats [to terminate federal funding if the School Board allowed KKK to use school facilities for a meeting]. Regulations promulgated pursuant to the Emergency School Aid Act in Title VI provide for administrative procedures incident to the termination of federal funding." (Pet.App. A-16, fn. 14.) **See also** 45 C.F.R. Parts 16, 80, 100-49, §185.45.

5. S.Rep. No. 94-1011, 94th Cong. 2d Sess. 5 (1976), **quoting Newman v. Piggie Park Enterprises, Inc.**, 390 U.S. 400, 402, 88 S.Ct. 964, 966, 19 L.Ed.2d 1263 (1968); **Supreme Court of Virginia v. Consumers Union**, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980).

6. **See e.g. Harrington v. DeVito**, 656 F.2d 264, 268 (7th Cir. 1981); **Milwe v. Cavuoto**, 653 F.2d 80, 82-4 (2d Cir. 1981); **Robinson v. Kimbrough**, 652 F.2d 458, 467 (5th Cir. 1981); **Bonnes v. Long**, 651 F.2d 214, 218-19 (4th Cir. 1981); **Teitelbaum v. Sorenson**, 648 F.2d 1248-51 (9th Cir. 1981); **Bond v. Stanton**, 630 F.2d 1231, 1234 (7th Cir. 1980); **Aware Woman Clinic, Inc. v. Cocoa Beach, Fla.**, 629 F.2d 1146, 1148-50 (5th Cir. 1980); **Riddell v. National Democratic Party**, 624 F.2d 539, 544-45 (5th Cir. 1980); **Love v. Mayor, City of Cheyenne, Wyo.**, 620 F.2d 235, 236 (10th Cir. 1980); **Northcross v. Board of Education of Memphis City Schools**, 611 F.2d 624, 635 (6th Cir. 1979); **Pickett v. Milam**, 579 F.2d 1118, 1121 (8th Cir. 1978); **Brown v. Culpepper**, 559 F.2d 274, 278 (5th Cir. 1977). The only apparent conflict in the circuits is whether "good faith" of the parties is one of the elements of "special circumstances" or whether good faith is not a "special circumstance" at all. Recent decisions of the Court indicate good faith is not a special circumstance to be considered in denying a fee award. **See Mahoning Women's Center v. Hunter**, 447 U.S. 98, 100 S.Ct. 3006, 65 L.Ed.2d 1110 (1980), **vacating and remanding** 610 F.2d 456 (6th Cir. 1979); **New York Gaslight Club, Inc. v. Carey**, 447 U.S. 54, 100 S.Ct. 2024, 64 L.Ed.2d 723 (1980); **Supreme Court of Virginia v. Consumers Union**, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980).

The petition does not disclose any facts which would exculpate the School Board from liability for attorney's fees. At best, the petition seeks to implicate HEW in the formulation and ultimate adoption of the School Board's blatantly unconstitutional school-use policy. The School Board's contention that it would never have adopted the school-use policy except for the intervention of HEW (Pet.13), ignores the undisputed fact that HEW never requested that the School Board adopt any type of school-use policy. The School Board was not under a deadline to adopt the policy and could have chosen not to adopt any policy at all. Instead, the School Board considered the matter for almost three months and finally decided to adopt a policy which was patently unconstitutional. Since the court below found as an undisputed fact that this decision was solely that of the School Board (Pet. App. A-16), the Board must bear responsibility for its policy and cannot shift responsibility to HEW or anyone else who may have merely influenced the School Board in making its decision. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 100 S.Ct. 1967, 64 L.Ed.2d 641, 657-58 (1980); *Johnson v. State of Mississippi*, 606 F.2d 635 (5th Cir. 1979).

3. The School Board does not question the well-settled law that "the legislative history of the Awards Act authorizes retroactive fee awards unless such an award would be 'manifestly unjust'."[7] (Pet.App. A-16.) Instead, the School Board seeks a review of this principle as applied to the facts of this case. However, there is nothing to review because the court of appeals found that the School Board "has not

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7. **Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); Universal Amusement Co., Inc. v. Vance, 559 F.2d 1286 (5th Cir. 1977), cert. denied 442 U.S. 928, 99 S.Ct. 2857, 61 L.Ed.2d 295 (1979); Beazer v. New York City Transit Authority, 558 F.2d 97 (2d Cir. 1977); King v. Greenblatt, 560 F.2d 1024 (1st Cir. 1977), cert. denied 438 U.S. 916, 98 S.Ct. 3146, 57 L.Ed.2d 1161 (1978); Bond v. Stanton, 555 F.2d 172 (7th Cir. 1977); Verrilli v. City of Concord, 557 F.2d 664 (9th Cir. 1977); Rainey v. Jackson State College, 551 F.2d 672 (5th Cir. 1977).**

attempted to demonstrate how retroactive application of the Awards Act would be more burdensome or unfair in this case than it would be in any other." (Pet.App. A-17.) The petition discloses no facts contrary to this determination by the court of appeals.

Furthermore, as noted by the federal respondent, the decision of the court of appeals on the School Board's liability is interlocutory because this case was remanded for a determination of "what amount, if any, of attorneys' fees reasonably may be assessed against the Board." (Pet.App. A-17.)

CONCLUSION

Therefore, it is respectfully submitted that as to Question 1, whether attorney's fees should be awarded against the federal respondent, certiorari should be granted and the Court should summarily reverse and remand this case to the district court with instructions to determine an award of attorney's fees against the federal respondent in conformity with the new Justice Act. As to Questions 2 and 3, whether assessment of fees against the School Board was appropriate, it is respectfully submitted that petitioner has failed to raise a serious or substantial issue to be reviewed by the Court and certiorari should be denied as to these questions.

Respectfully submitted,

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v.

KNIGHTS OF THE KU KLUX KLAN, REALM OF LOUISIANA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

This action, seeking injunctive relief under civil rights legislation and the First and Fourteenth Amendments, was brought by Respondent Knights of the Ku Klux Klan, Realm of Louisiana (KKK) against Petitioner East Baton Rouge Parish School Board and the Department of Health, Education, and Welfare.[1] After the KKK prevailed, the court of

[1] The education functions of HEW have now been transferred to the respondent Department of Education pursuant to the Department of Education Organization Act, 20 U.S.C. (Supp. III) 3401 *et seq.*

appeals held that the Civil Rights Attorney's Fees Awards Act of 1976 (Awards Act), 42 U.S.C. 1988, does not waive the government's immunity from an award of attorneys' fees, but does provide for an award of attorneys' fees against petitioner. The court below remanded for a determination of what amount, if any, should be assessed. Petitioner challenges both aspects of the court of appeals' decision, arguing that the Awards Act authorizes attorneys' fees against the government and that the Act does not authorize an award against petitioner because (1) special circumstances render the award unjust, and (2) the Act should not be applied to this case, which was commenced before the Act's effective date.

1. On November 17, 1975, petitioner granted the KKK permission to use a high school gymnasium for a "patriotic meeting" on the night of November 22, 1975. 578 F.2d 1122, 1123, 1136 (1978). Three days later, however, the Board rescinded its approval, "prompted at least in part" by a November 19 telephone call from Dr. John Bell, chief of the Dallas, Texas Branch Office for Civil Rights of HEW. *Id.* at 1123, 1131. In this first of two communications to the Board, Dr. Bell advised that permitting the KKK the use of the gym would violate regulations promulgated under statutes controlling federal aid received by the school district and warned that his office would begin enforcement proceedings to terminate that federal aid if the use was allowed. *Id.* at 1123, 1137-1138. In a November 21 telegram, however, Dr. Bell explained to the Board that the statutory and regulatory prohibitions on racial dis-

crimination which he had cited in his telephone call "cannot be read to authorize conduct constituting an impermissible abridgement of First Amendment rights," and noted that conduct required by the First Amendment could not be grounds for enforcement proceedings. *Id.* at 1123-1124, 1139.

Upon the Board's cancellation of the permit, the KKK initiated this suit against the Board under 42 U.S.C. (& Supp. III) 1983 and the First and Fourteenth Amendments, later amending its complaint to include HEW and also to challenge an official policy regarding use of school facilities adopted by the Board on February 19, 1976. 578 F.2d at 1124. That policy, endorsed by the Board three months after Dr. Bell's telephone call, provided in part for the denial of permits for the use of school facilities to any persons advocating racial discrimination. *Id.* at 1124, 1144-1145.

The United States District Court for the Middle District of Louisiana denied the injunctive relief requested by the KKK and ruled that the new Board policy did not violate First and Fourteenth Amendment rights. 578 F.2d at 1124. The Fifth Circuit reversed and remanded. *Id.* at 1128. On remand, the district court entered a preliminary injunction against the defendants, held a trial on the merits, and ultimately ruled in favor of the KKK (Pet. App. A-1). The court not only permanently enjoined the Board from using the beliefs advocated by applicants as a criterion for granting or denying permits, it also ordered HEW to refrain from interfering with the KKK's legitimate use of East Baton Rouge Parish School District facilities (Pet. App. A-1 to A-3).

In a subsequent order, the district court adjudged HEW liable to the KKK for $11,681.25 in attorneys' fees and $239.16 in costs, while releasing the Board

from any responsibility for such fees or costs (Pet. App. A-5). HEW appealed from the award of attorneys' fees (but not costs) against it, and the KKK cross-appealed on the issue of the Board's liability for attorneys' fees. The court of appeals reversed on both issues, holding that the doctrine of sovereign immunity, codified in 28 U.S.C. 2412, barred the award of attorneys' fees against the United States in this case (Pet. App. A-8, A-11). The court rejected petitioner's contention that the Awards Act, 42 U.S. 1988, waives federal sovereign immunity, noting that such a waiver must be clear and express (Pet. App. A-8, citing *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 267-268 (1975)). The court held that Section 1988 does provide, however, for the imposition of fees against the petitioner because no "special circumstances" exist that would render such an award "unjust" (Pet. App. A-11, A-15). Moreover, the court held that attorneys' fees could be awarded against the Board under the Awards Act even though this suit had been commenced prior to the effective date of the Act, because such an award would not be "manifestly unjust" (Pet. App. A-16, A-17). The court remanded the case for a determination of what amount, if any, of attorneys' fees would be reasonable to assess against the Board.

2. The holding of the court of appeals that the Civil Rights Attorney's Fees Awards Act of 1976 does not waive federal sovereign immunity is correct and does not conflict with any decision of this Court or other courts of appeals. Accordingly, further review on that issue is unwarranted.

Although it has never ruled on the precise issue petitioner raises, this Court consistently has held that waivers of federal sovereign immunity "cannot be implied but must be unequivocally expressed."

United States v. *King*, 395 U.S. 1, 4 (1969). Specifically as to attorneys' fees, this Court held in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), that 28 U.S.C. 2412 "on its face, and in light of its legislative history" generally bars awards of attorneys' fees unless they are "expressly provided for by statute." *Id.* at 267-268.

Studiously observing this interpretation of Section 2412, two other courts of appeals, in addition to the Fifth Circuit below, have carefully examined the exact issue raised in the petition and have reached the same conclusion. *National Association for the Advancement of Colored People* v. *Civiletti*, 609 F.2d 514 (D.C. Cir. 1979), cert. denied, 447 U.S. 922 (1980); *Shannon* v. *United States Department of Housing & Urban Development*, 577 F.2d 854 (3d Cir.), cert. denied, 439 U.S. 1002 (1978). See also *Southeast Legal Defense Group* v. *Adams*, 436 F. Supp. 891 (D. Ore. 1977).[3] After full consideration of the language and legislative history of the Awards Act, the courts of appeals have thus uniformly held that the Awards Act does not contain the clear, express waiver of sovereign immunity that statute and precedent require.

Moreover, Congress recently enacted the Equal Access to Justice Act, Pub. L. No. 96-481, Section 201, 94 Stat. 2325 *et seq.*, effective October 1, 1981. That statute will make the United States liable for costs and attorneys' fees in certain situations in which the government has heretofore remained im-

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[3] See also, in related contexts, *Staten* v. *Housing Authority of the City of Pittsburgh*, 638 F.2d 599, 602 (3d Cir. 1980); *Equal Employment Opportunity Commission* v. *Kenosha Unified School District No. 1*, 620 F.2d 1220, 1226-1227 (7th Cir. 1980); *Bush* v. *Bays*, 463 F. Supp. 59, 63 (E.D. Va. 1978).

mune. Particularly in light of Congress' effort, through this new and somewhat complex legislation, to address comprehensively the issue of the government's liability for attorneys' fees, there is no need for the Court to consider the issue in the previous statutory context.

3. The government takes no position on whether the court below correctly held that petitioner may be liable for attorneys' fees to the KKK (Pet. App. A-14 to A-17). We note, however, that the court of appeals' decision is interlocutory on this issue inasmuch as the court remanded for a determination of "what amount, if any, of attorneys' fees reasonably may be assessed against the Board" (Pet. App. A-17).

It is therefore respectfully submitted that, at least as to Question 1, the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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